

Below is an Opinion of the Court.


PETER C. MCKITTRICK
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:

PETER SZANTO,

Debtor.

Bankruptcy Case
No. 16-33185-pcm7

PETER SZANTO,

Plaintiff,

v.

Adv. Proc. No. 16-3114-pcm

MEMORANDUM OPINION

EVYE SZANTO, VICTOR SZANTO, NICOLE
SZANTO, KIMBERLEY SZANTO, MARIETTE
SZANTO, ANTHONY SZANTO, AUSTIN
BELL, JOHN BARLOW, and BARBARA
SZANTO ALEXANDER,

Defendants.

This matter came before the Court on October 24, 2017,¹ on the parties' cross-motions for summary judgment. Plaintiff filed a First

¹ After oral argument, the court took this matter under advisement. Before the court issued its ruling, plaintiff's Chapter 11 case was converted to a case under Chapter 7. Case No. 16-33185-pcm7, Doc. 278. The court informed the parties that it would delay ruling on this matter until the newly appointed Chapter 7 trustee determined whether he would

1 Amended Complaint ("Complaint") against defendants. Doc. 34. Plaintiff
2 labels his claims as (1) conversion; (2) conversion of debtor's
3 personality, image, likeness, unique identifying factors and other
4 similar individual identifying and recognition features (hereinafter
5 "identity theft claim"); (3) civil claim for relief based on statutory
6 remedies for defendants' improper racketeer influenced and corrupt
7 organizations act actions (hereinafter "RICO claim"); (4) breach of
8 fiduciary duty; (5) fraud; (6) conspiracy; (7) improper creation of
9 income tax liability against debtor; and (8) intentional/negligent
10 infliction of emotional distress. Defendants answered, and asserted
11 three counter-claims: (1) attorney fees; (2) wrongful initiation of
12 civil proceedings; and (3) injunction and vexatious litigant
13 designation. Doc. 66.

14 Plaintiff moved for summary judgment on defendants' second counter-
15 claim, for wrongful initiation of civil proceedings. Doc. 199
16 (hereinafter "Plaintiff's Motion").² Defendants move for summary
17 judgment on all of plaintiff's claims and for partial summary judgment

18 administer these claims. On January 25, 2018, trustee Stephen Arnot
19 filed notice of his intent to abandon the claims in this adversary
20 proceeding, to which debtor objected. After a hearing, the court ruled
21 that the abandonment would be permitted, and the abandonment became
22 effective April 10, 2018. See Case No. 16-33185-pcm7, Doc. 443.
23 Further, plaintiff filed additional motions in this adversary proceeding
24 to reopen discovery, which the court denied. Docs. 340 and 367.
25 Because plaintiff is again the real party in interest and his latest
26 motions to reopen discovery have been denied, the cross-motions are now
ripe for decision.

2 Plaintiff's motion addresses a number of topics. However, for the
reasons set out below, the only issue properly raised on summary
judgment is that which pertains to defendants' claim for wrongful
initiation of civil proceedings. Accordingly, the court treats
plaintiff's motion as a motion for summary judgment on that claim.

1 on defendants' second counter-claim. Docs. 216, 217 (hereinafter
2 "Defendants' Motion"). Neither party moved for summary judgment on
3 defendants' first and third counter-claims (attorney fees and vexatious
4 litigant designation).

5 DISCUSSION

6 The court shall grant summary judgment when the moving party shows
7 that there is no genuine dispute of material facts and that the party is
8 entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Fed. R.
9 Bankr. P. 7056. In deciding the motion, the court must view the
10 evidence in the light most favorable to and draw all justifiable
11 inferences in favor of the non-moving party. Fresno Motors, LLC v.
12 Mercedes Benz USA, LLC, 771 F.3d 1119, 1125 (9th Cir. 2014). Where the
13 moving party has properly supported its motion for summary judgment, the
14 party opposing judgment must provide specific facts showing that there
15 is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S.
16 242, 250 (1986).

17 However, deference to the nonmoving party has limits.
18 The nonmoving party must set forth "specific facts
19 showing a genuine issue for trial." Fed.R.Civ.P. 56(e).
20 The "mere existence of a scintilla of evidence in support
21 of plaintiff's positions [is] insufficient." Anderson v.
22 Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).
23 Therefore, where "the record taken as a whole could not
24 lead a rational trier of fact to find for the nonmoving
25 party, there is no genuine issue for trial." Matsushita
Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S.
26 574, 587 (1986) (internal quotation marks omitted).

25 Liberty Nat. Prod., Inc. v. Hoffman, 2012 WL 1203979, at *3 (D. Or. Apr.
26 11, 2012).

1 1. Plaintiff's Claims

2 a. Choice of Law

3 With the exception of the RICO claim, plaintiff's claims are all
4 based on state law. As a result, this court must first determine which
5 state's law applies. "In federal question cases with exclusive
6 jurisdiction in federal court, such as bankruptcy, the court should
7 apply federal, not forum state, choice of law rules." In re Lindsay, 59
8 F.3d 942, 948 (9th Cir. 1995) (collecting cases); In re Sterba, 852 F.3d
9 1175, 1179 (9th Cir. 2017), petition for cert. filed (U.S. Sept. 15,
10 2017) (No. 17-423). The Court of Appeals for the Ninth Circuit follows
11 the Restatement (Second) of Conflict of Laws (1971) ("Restatement") to
12 the extent it concludes that the Restatement is persuasive. See Sterba,
13 852 F.3d at 1179 (citing Flores v. American Seafoods Co., 335 F.3d 904,
14 919 (9th Cir. 2003)). The choice of law analysis differs for
15 substantive issues and statutes of limitations.

16 The substantive claims at issue are tort claims. The Second
17 Restatement states a "general principle" for tort claims:

18 (1) The rights and liabilities of the parties with
19 respect to an issue in tort are determined by the local
20 law of the state which, with respect to that issue, has
21 the most significant relationship to the occurrence and
the parties under the principles stated in § 6.

22 (2) Contacts to be taken into account in applying the
23 principles of § 6 to determine the law applicable to an
issue include:

24 (a) the place where the injury occurred,

25 (b) the place where the conduct causing the injury
26 occurred,

1 (c) the domicile, residence, nationality, place of
2 incorporation and place of business of the parties, and
3 (d) the place where the relationship, if any, between the
parties is centered.

4 These contacts are to be evaluated according to their
5 relative importance with respect to the particular issue.

6 Restatement (Second) of Conflict of Laws § 145 (1971). The principles
7 stated in § 6 are:

8 (a) the needs of the interstate and international
9 systems,

10 (b) the relevant policies of the forum,

11 (c) the relevant policies of other interested states and
12 the relative interests of those states in the
13 determination of the particular issue,

14 (d) the protection of justified expectations,

15 (e) the basic policies underlying the particular field of
16 law,

17 (f) certainty, predictability and uniformity of result,
18 and

19 (g) ease in the determination and application of the law
to be applied.

20 Id.

21 The applicable statute of limitations is also at issue in several
22 of plaintiff's claims. The Ninth Circuit has adopted the following
23 analytical framework for addressing statute of limitations issues:

24 First, the Court must decide what choice-of-law rule
25 governs the selection of the statute of limitations.
26 Second, the Court must apply that rule to determine which
jurisdiction's limitations law applies. Third, and

1 finally, the Court [must] determine whether plaintiffs'
2 claims fall within the relevant limitations period.

3 Huynh v. Chase Manhattan Bank, 465 F.3d 992, 997 (9th Cir. 2006)
4 (quoting Cruz v. U.S., 387 F.Supp.2d 1057, 1070 (N.D.Cal. 2005). As
5 noted above, because this adversary proceeding arises in the context of
6 a bankruptcy case, federal choice of law rules apply.

7 Federal common law follows the approach outlined in the
8 Restatement (Second) of Conflict of Laws. Accordingly,
9 barring exceptional circumstances, we consider the
10 following factors:

11 (1) The forum will apply its own statute of limitations
12 barring the claim.

13 (2) The forum will apply its own statute of limitations
14 permitting the claim unless:

15 (a) maintenance of the claim would serve no substantial
16 interest of the forum; and

17 (b) the claim would be barred under the statute of
18 limitations of a state having a more significant
19 relationship to the parties and the occurrence.

20 Huynh v. Chase Manhattan Bank, 465 F.3d at 997 (quoting Restatement
21 (Second) of Conflicts of Law § 142 (1988)).

22 b. Conversion

23 Plaintiff's first claim, for conversion, alleges that defendants
24 converted both real and personal property belonging to him when, in
25 2005, they took possession of 105 Baywood Ave., Hillsborough, CA (the
26 "Baywood Property") and personal property that plaintiff stored there.
Complaint, ¶¶ 103-14. Defendants seek summary judgment on this claim on
several grounds. Defendants' Memorandum in Support of Defendants'
Motion for Partial Summary Judgment, Doc. 217 (hereinafter "Defendants'")

1 Memo"). I conclude that, because plaintiff's claim for conversion of
2 personal property is barred by the statute of limitations, I need not
3 reach defendants' other arguments about converted personal property.
4 The remainder of plaintiff's claim fails, because real property cannot
5 form the basis of a conversion claim.

6 This court applies federal common law, as it must, to determine the
7 applicable statute of limitations to the conversion claim. Pursuant to
8 federal common law, the forum state statute of limitations applies if it
9 would bar the claim. If it would allow the claim, the forum state
10 statute of limitations applies unless the forum state has no interest in
11 the claim and the statute of limitations of a state having a more
12 significant relationship to the parties and the occurrence would permit
13 the claim.

14 Under Oregon law, a claim for conversion must be brought within six
15 years and accrues when the plaintiff knew or reasonably should have
16 known the elements of his claim. Rice v. Rabb, 354 Or. 721, 733-34
17 (2014); see also ORS 12.080(4). In this case, Oregon law applies,
18 because the claim is barred under Oregon law.³

19 On June 5, 2009, plaintiff filed a First Amended Cross-Complaint in
20 the Superior Court of California in Orange County ("2009 Complaint")

21
22 3 "California law, the only other plausibly applicable statute of
23 limitations, would also bar the claim. California law requires a claim
24 for conversion to be brought within three years of the wrongful taking.
25 AmerUS Life Ins. Co. v. Bank of America, N.A., 143 Cal. App. 4th 631,
26 639 (2006). The period is tolled only when the defendant "fraudulently
conceals the relevant facts or where the defendant fails to disclose
such facts in violation of his or her fiduciary duty to the plaintiff,"
in which case the statute of limitations period commences when the
plaintiff discovers or ought to have discovered the conversion. Id.

1 against several of the same defendants named in this action. Szanto v.
2 Szanto, Case No. 05 CC 08539 (Superior Court of California, County of
3 Orange, 20090). The 2009 Complaint asserts, among other things, causes
4 of action for trover and conversion. Ex. 3 to Decl. of Nicholas J.
5 Henderson (Doc. 216) (hereinafter "Henderson Decl.") In those claims,
6 plaintiff asserted that the defendants in that action willfully and
7 wrongfully "conver[ted] Peter Szanto's goods, possessions and property
8 without Peter Szanto's permission, consent or acquiescence." Id. at ¶¶
9 20, 26. Plaintiff further alleged that defendants "interfere[d] with
10 Peter Szanto's dominion and access to his goods, possessions and
11 property—as well as personal property and artwork Peter Szanto
12 maintained at his own home and which Peter Szanto maintains at the home
13 of Peter Szanto's parents." Id. at ¶¶ 23, 28. This is the same
14 personal property that forms the basis of plaintiff's conversion claims
15 in the present adversary proceeding. Thus, plaintiff knew before June
16 5, 2009, the elements of the conversion claim as to his personal
17 property.

18 Plaintiff briefly addressed the statute of limitations in his
19 Response. He first argued without explanation that a pending action in
20 state court related to the Paul and Klara Szanto Revocable Trust's
21 (hereinafter the "Trust") ownership of the Baywood Property tolls the
22 statute of limitations. However, plaintiff cited no law supporting his
23 position and this court found none. Plaintiff further argued that Cal.
24 Prob. Code § 10382 operates to toll the statute of limitations, because
25 a final accounting for the Trust was not made to plaintiff. Plaintiff
26 argues that, if Oregon law applies, ORS 115.005(5)(a) exempts his cause

1 of action from any statute of limitations, because part of the relief he
2 seeks in this claim is to reform the title of the Baywood Property or
3 quiet title in his favor.

4 As explained above, Oregon law applies. However, ORS 115.005 is
5 inapplicable. This statute relates to claims against the estate of a
6 decedent. None of the defendants in this adversary proceeding is an
7 estate. Accordingly, plaintiff's arguments that the statute of
8 limitations applicable to his claims was tolled are not well taken.
9 Moreover, Cal. Prob. Code § 10382 does not aid plaintiff. Cal. Prob.
10 Code § 10382 sets out when an action may be maintained against a
11 personal representative of a trust pursuant to Cal. Prob. Code § 10380.
12 Plaintiff's claim for conversion is not a claim under Cal. Prob. Code §
13 10380. Therefore, although there is very little case law interpreting
14 Cal. Prob. Code § 10382, this statute does not appear to apply to the
15 context in which plaintiff seeks to put it to use.

16 Plaintiff knew of his conversion claim at least by June 2009, thus
17 the claim accrued more than seven years before plaintiff filed this
18 adversary proceeding in December 2016.⁴ Accordingly, plaintiff's claim
19 for conversion of personal property is time barred under Oregon law.

20 Plaintiff also claims conversion of the Baywood property itself.
21 Because the claim fails under either Oregon or California law, I need
22 not determine which state's law should apply.

23 ///

24 _____
25 4 The original complaint was filed in September 2016; it did not
26 allege a claim for conversion. Even if it did, the claim would still be
barred by the statute of limitations, because it was brought more than
six years after the claim accrued.

1 Oregon adopts the definition of conversion set forth in Restatement
2 (Second) of Torts § 222A(1): "an intentional exercise of dominion or
3 control over a chattel which so seriously interferes with the right of
4 another to control it that the actor may justly be required to pay the
5 other the full value of the chattel." Rice v. Rabb, 354 Or. At 724 n. 4
6 (quoting Mustola v. Toddy, 253 Or. 658, 663 (1969)). "The term
7 'chattel,' in legal parlance, ordinarily refers to '[a]n article of
8 personal property, as opposed to real property. A thing personal and
9 moveable.'" Ass'n of Unit Owners of Bridgeview Condominiums v. Dunning,
10 187 Or. App. 595, 616 (2003) (analyzing a product liability claim using
11 the Restatement (Second) of Torts and quoting Black's Law Dictionary 215
12 (5th ed. 1981)).

13 Under California law, "[t]he basic elements of the tort of
14 conversion are (1) plaintiff's ownership or right to possession of
15 personal property; (2) defendant's disposition of property in a manner
16 inconsistent with plaintiff's property rights; and (3) resulting
17 damages." Fremont Indem. Co. v. Fremont General Corp., 148 Cal. App.
18 4th 97, 119 (2007). "It is generally acknowledged that conversion is a
19 tort that may be committed only with relation to personal property and
20 not real property." Munger v. Moore, 11 Cal. App. 3d 1, 7 (1970).

21 Because real property cannot form the basis of a conversion claim
22 under either Oregon or California law, this portion of plaintiff's
23 conversion claim also fails.

24 Summary judgment for defendants will be entered on plaintiff's
25 first claim for relief.

26 ///

1 c. Identity Theft

2 Defendants move for summary judgment on plaintiff's identity theft
3 claim on the basis that plaintiff has no evidence to support his claim.
4 Defendants support their contention with deposition testimony from
5 plaintiff in which plaintiff testified that his brothers Victor and
6 Anthony Szanto had motive, opportunity, and ability to steal his
7 identity and that the timing coincided with contentious litigation
8 between the parties related to the probate of their parents' estate.

9 As an initial matter, it appears that both Oregon and California
10 recognize a private right of action for identity theft. Under
11 California law:

12 Based in part upon Penal Code section 530.5, as well as
13 statutory provisions in the civil law which specifically
14 proscribe the type of conduct alleged here as "identity
15 theft," California case law has already noted that an
16 individual's "'personal identifying information' . . .
17 can be the object of theft"; that such a theft "can have
18 serious consequences to that person," and that as a
19 consequence, such misconduct would give rise to a claim
20 against the perpetrator for damages. (CTC Real Estate
21 Services v. Lepe (2006) 140 Cal.App.4th 856, 860-861.)
22 As explained in Fremont Indemnity Co. v. Fremont General
23 Corp. (2007) 148 Cal.App.4th 97, a cause of action for
24 conversion may be stated for the theft of intangible
25 personal property. "The basic elements of the tort are
26 (1) the plaintiff's ownership or right to possession of
personal property; (2) the defendant's disposition of the
property in a manner that is inconsistent with the
plaintiff's property rights; and (3) resulting damages."
(Id. at p. 119; accord, A & M Records, Inc. v. Heilman
(1977) 75 Cal.App.3d 554, 570.)

Moreover, to the extent that any such intentional
misconduct rose to the level of "extreme and outrageous"
it would also entitle the victim to recover damages for
any resulting "severe emotional distress." (Unterberger

1 v. Red Bull North America, Inc. (2008) 162 Cal.App.4th
2 414, 423.)

3 Szanto v. Szanto, 2008 WL 4726452, at *6 (Cal. App., Oct. 29, 2008)
4 (unpublished) (summarizing California law regarding identity theft).

5 Although Oregon appellate courts do not appear to have directly
6 addressed the issue, Oregon district courts have interpreted "chattels"
7 to include intangible property such as broadcast licenses, the right to
8 bring a lawsuit, and patent rights. Joe Hand Productions v. Holmes,
9 2015 WL 5144297, at *6 (D. Or. Aug. 31, 2015). Moreover, debtor's claim
10 also encompasses alleged theft of physical documents, including
11 "debtor's original U.S. naturalization certificate, debtor's original
12 U.S. social security card, various driver's licenses, photo-id's from
13 various courthouses where Peter Szanto had worked" and "financial books
14 [and] legal and bank papers . . ." Complaint, ¶70. The reasoning in
15 Holmes is persuasive. A conversion claim for theft of personal
16 identifying information may likely be brought under Oregon law. As I
17 have said above, Oregon adopts the definition of conversion set forth in
18 Restatement (Second) of Torts § 222A(1): "an intentional exercise of
19 dominion or control over a chattel which so seriously interferes with
20 the right of another to control it that the actor may justly be required
21 to pay the other the full value of the chattel." Rice, 354 Or. at 724
22 n. 4 (2014) (quoting Mustola v. Toddy, 253 Or. 658, 663 (1969)).

23 Because the elements of the cause of action are substantially
24 different in Oregon and California, a choice of law issue exists.
25 Applying federal conflict of law analysis, this court must next
26 determine "the state which, with respect to that issue, has the most
 significant relationship to the occurrence and the parties," as

1 determined by the place of the conduct and injury, the domicile or
2 residence of the parties, and the place where the parties' relationship
3 is centered. Restatement (Second) Conflict of Laws § 145 (1971). The
4 court must also apply the principles in § 6, including the needs of
5 interstate systems, the relevant policies of the forum and other
6 interested states, the protection of justified expectations, the
7 policies underlying the relevant field of law, certainty,
8 predictability, uniformity of result, and ease in determination and
9 application. Id.

10 At the time of the alleged conversion, all parties were located in
11 California and at least some, including plaintiff, were citizens of
12 California. Moreover, the alleged conversion took place in California.
13 None of plaintiff's allegations related to this claim implicate people
14 who were Oregon citizens at the time, Oregon property, or Oregon law.
15 Moreover, this claim does not present any novel issues that would hinder
16 this court in applying California law. By contrast, novel issues do
17 exist under Oregon law. Accordingly, California has the most
18 significant relationship to the occurrence and parties and California
19 law will be applied.

20 Defendants argue that plaintiff failed to provide any evidence to
21 support his claim. Mere allegations that the defendants had a motive
22 and opportunity to improperly use plaintiff's personal identifying
23 information are insufficient to defeat a motion for summary judgment.
24 See Jeffers v. Gomez, 267 F.3d 895, 907 (9th Cir. 2001) (quoting
25 Crawford-El v. Britton, 523 U.S. 574 (1998)). Plaintiff argues that he
26 has "fully enunciated the *modus operandi* methodology and exemplification

1 for the perpetration of [the alleged] identity theft." Plaintiff's
2 Response, p. 18. Plaintiff summarizes his evidence as

3 the circumstances of the dispute between the parties and
4 the manner whereby defendants were able to freely access
5 plaintiff's office in the 105 Baywood property; and
6 thereby acquire plaintiff's personal identifying
7 information and original driver's licenses,
8 naturalization papers, expired passports so as to thereby
create identities for themselves to use in the creation
of bank accounts and credit cards in plaintiff's name for
defendants [sic] exclusive use and enrichment.

9 Id. Plaintiff further argues that defendants were motivated to steal
10 his identity on the ground that doing so would distract plaintiff from
11 pursuing his probate and conversion claims against defendants. Id. at
12 19.

13 However, plaintiff failed to produce **any** evidence of any
14 transactions or events in which his identity was falsely used. He
15 failed to identify specific accounts that were opened in his name or
16 detail any specific instances in which his identity was inappropriately
17 used. He did not allege or provide any evidence that specified what
18 debts were incurred, what accounts were falsely opened, how those
19 obligations were resolved, or any amounts he had to pay on loans or
20 credit charges he did not initiate. For example, plaintiff did not
21 produce **any** records of unauthorized bank account activity such as
22 statements or signature cards, or correspondence from banks regarding
23 any such issues. He also did not provide **any** evidence of credit
24 accounts such as credit card statements, correspondence with credit card
25 companies, account applications, or documents showing any negotiated
26 resolutions of any false accounts. This is the type of evidence to

1 which plaintiff should have ready access and should be readily available
2 to plaintiff from his own records or by request to his financial
3 institutions.

4 Taking together plaintiff's allegations in his complaint and his
5 deposition testimony, and plaintiff's failure to present any specific
6 evidence of identity theft, plaintiff's allegations amount to mere
7 conclusory statements and are insufficient to overcome defendants'
8 summary judgment motion on this claim. Accordingly, judgment for
9 defendants will be entered on plaintiff's second claim for relief.

10 d. RICO

11 Plaintiff's third claim, a claim for relief under the federal
12 Racketeer Influenced and Corrupt Organizations Act ("RICO"), is based on
13 alleged collusion by defendants to deprive him of the same property
14 addressed by his conversion and identity theft claims discussed above.
15 Defendants move for summary judgment on the basis that plaintiff has
16 failed to produce any evidence in support of his claims that defendants
17 acted improperly with respect to any of the allegations leveled against
18 them. "To state a [RICO claim], a plaintiff must allege '(1) conduct
19 (2) of an enterprise (3) through a pattern (4) of racketeering
20 activity.'" Odom v. Microsoft Corp., 486 F.3d 541, 547 (9th Cir. 2007)
21 (quoting Sedima, S.P.R.L. v. Imrex Co. Inc., 473 U.S. 479, 496 (1985)
22 (footnote omitted)).

23 Plaintiff alleges that defendants' theft of his identity
24 constitutes a "racketeering activity." However, the court need not
25 reach that issue. As discussed above, plaintiff produced no evidence to
26 ///

1 support his underlying claims of identity theft. As a result, the RICO
2 claim based on the same allegations also fails.

3 Plaintiff also claims that defendants violated RICO when they
4 converted his interest in the Baywood Property and his personal property
5 located there. Defendants argue that no evidence exists to support
6 plaintiff's claims. Defendants' Memo, p. 20. Although plaintiff does
7 not address defendants' Motion as it relates to the RICO claim
8 specifically, plaintiff alleges that defendants failed to produce the
9 evidence contained within "boxes and boxes and boxes" of documents from
10 his mother that are in Victor Szanto's custody.

11 Specifically, plaintiff argues that defendants withheld relevant
12 documents in the "boxes and boxes and boxes" in Victor Szanto's
13 possession. Presumably, plaintiff is arguing that he was prevented from
14 producing sufficient evidence because defendants failed to turn over
15 discovery plaintiff specifically requested in the discovery process.
16 Beyond his argument regarding the "boxes" of documents, plaintiff does
17 not address defendants' motion with respect to his RICO claim, much less
18 supply the court with any evidence in support of his claim.

19 At the time of his deposition on June 8, 2017, Victor Szanto
20 testified that he had boxes of documents from his parents' estate that
21 he had not "begun to comb through yet." Plaintiff's Response, Ex. C, p.
22 2-3. However, on August 8, 2017, defendants filed the Declaration of
23 Victor Szanto in Support of Defendants' Response to Plaintiff's Third
24 Motion to Compel Production of Documents, Doc. 184, p. 64-66
25 (hereinafter "Victor Szanto Declaration"), which stated that "I have
26 produced all documents that are in any way related to Plaintiff Peter

1 Szanto, his allegations in this case, or the defenses asserted by the
2 Defendants in this case." Plaintiff produced no credible evidence of
3 his own to challenge the Victor Szanto Declaration and merely speculates
4 that defendants' production is incomplete. Although the court
5 recognizes that requiring a party to prove the existence of documents to
6 which he does not have access presents a significant challenge,
7 plaintiff has provided no documentation of any sort to support his
8 claims. If the facts alleged in the Complaint are true, the court would
9 expect that there would be some evidence beyond the "boxes and boxes" of
10 documents sought by plaintiff. In the absence of something more than
11 plaintiff's mere speculation that defendants' production was inadequate
12 and in light of the evidence submitted in Victor Szanto's Declaration,
13 the court does not find plaintiff's arguments regarding the "boxes" of
14 documents meritorious.

15 Accordingly, plaintiff's bare allegations that defendants have not
16 been fully compliant with the requirements of discovery are not
17 sufficient to sustain his RICO claim. Plaintiff has not provided
18 sufficient evidence to sustain his RICO claim and summary judgment will
19 be granted.

20 e. Breach of Fiduciary Duty

21 Defendants move for summary judgment on plaintiff's fourth claim
22 for relief, breach of fiduciary duty, on the basis that plaintiff lacks
23 any evidence to support his claim.

24 Under both California and Oregon law, "[t]he elements of a cause of
25 action for breach of fiduciary duty are: (1) existence of a fiduciary
26 duty; (2) breach of the fiduciary duty; and (3) damage proximately

1 caused by the breach." Tribeca Companies, LLC v. First Am. Title Ins.
2 Co., 239 Cal. App. 4th 1088, 1114 (2015)(internal citations and
3 quotations omitted); see also Evergreen West Bus. Ctr., LLC v. Emmert,
4 254 Or. App. 361, 367 (2012), rev'd on other grounds, 354 Or. 790
5 (2014). Because the elements of the claim are the same in both states,
6 I need not decide which state's law applies.

7 In support of their motion as it relates to plaintiff's breach of
8 fiduciary duty claim, defendants argue that plaintiff failed to (1)
9 establish a fiduciary relationship and (2) demonstrate proof of any
10 breach of such a duty.

11 In support of defendants' first argument, that plaintiff failed to
12 prove the existence of a fiduciary duty, defendant Victor Szanto
13 provided a declaration to which was attached a true and correct copy of
14 Klara Szanto's last will (Ex. 13), an instrument entitled "The Paul and
15 Klara Szanto Revocable Trust" (Ex. 14), an instrument entitled "The Paul
16 Szanto Survivor's Trust" (Ex. 15), and Paul Szanto's last will (Ex. 16).
17 Defendants argue that none of the attached documents establish a
18 fiduciary relationship between plaintiff and any of the defendants. In
19 response, plaintiff provided a copy of an earlier iteration of the Paul
20 and Klara Szanto Revocable Trust document. Plaintiff's Response, Ex. H.
21 This earlier iteration, unlike the iteration submitted by defendants,
22 includes plaintiff as a beneficiary of the Trust. Plaintiff appears to
23 argue that the changes resulting in the later iteration were obtained by
24 improper methods and, therefore, the later iteration is void. However,
25 I agree with defendants that plaintiff provides insufficient evidence to
26 support this argument.

1 Plaintiff alleged that defendants obtained the changes to the trust
2 through various types of elder abuse and manipulation. Complaint,
3 ¶¶ 58-65. When asked about these allegations, plaintiff testified in
4 his deposition that he had no direct evidence in support of the
5 allegations he made but instead that he deduced these facts from vague
6 statements made by his mother in combination with her failure to answer
7 certain questions he put to her over the telephone. Henderson Decl. Ex.
8 1, pp. 13-15. In plaintiff's Response, he repeats the allegations that
9 his parents were subjected to "enormous psychological and physical
10 pressure, both emotional and physical," Plaintiff's Response, p. 13, but
11 again fails to provide any evidence in support of this allegation.
12 Plaintiff's vague allegations are insufficient to survive summary
13 judgment. Plaintiff's sole basis for asserting abuse of his mother was
14 a telephone conversation he had with his mother at a time when plaintiff
15 was purportedly located in a hospital bed in Israel. Id. Plaintiff's
16 intuition of his mother's condition based on one telephone call is not
17 supported by any other evidence. Taken alone, it is not sufficient to
18 support plaintiff's argument that later trust documents are void.

19 Plaintiff has not demonstrated that anything beyond a "scintilla of
20 evidence" exists to support his claims that a fiduciary relationship
21 exists between plaintiff and Victor and Anthony Szanto. Accordingly,
22 defendants' motion for summary judgment as to plaintiff's breach of
23 fiduciary duty claim will be granted.

24 f. Fraud

25 For his fifth claim, fraud, plaintiff alleges that defendants made
26 false and fraudulent statements "regarding plaintiff's identity which

1 they knew to be untrue (particularly that they had right (or implication
2 of the right) to use plaintiff's identity)." Complaint, ¶ 137.
3 Plaintiff further alleges that he was damaged by these representations
4 because banks and other lenders relied on these representations and
5 loaned money on that basis, which was never repaid. Complaint, ¶¶ 140-
6 42. Plaintiff alleges he suffered further damage when the unrepaid
7 loans resulted in collection activities and negative credit reporting.
8 Complaint, ¶¶ 142-43.

9 Defendants seek summary judgment on this claim, arguing that
10 plaintiff inadequately pled his claim and cannot satisfy his burden of
11 proof on at least two of the elements of fraud: (1) defendants' intent
12 that plaintiff rely on their alleged misrepresentations; and (2) actual
13 reliance.

14 Under Oregon law,

15 [t]he essential elements of a common-law fraud claim are:
16 [(1)] the defendant made a material misrepresentation
17 that was false; [(2)] the defendant did so knowing that
18 the representation was false; [(3)] the defendant
19 intended the plaintiff to rely on the misrepresentation;
20 [(4)] the plaintiff justifiably relied on the
misrepresentation; and [(5)] the plaintiff was damaged as
a result of that reliance.

21 Strawn v. Farmers Ins. Co. of Oregon, 350 Or. 336, 351-52 (2011),
22 adhered to on reconsideration, 350 Or. 521 (2011).

23 Under California law,

24 To establish a claim for deceit based on intentional
25 misrepresentation, the plaintiff must prove seven
26 essential elements: (1) the defendant represented to the
plaintiff that an important fact was true; (2) that
representation was false; (3) the defendant knew that the

1 representation was false when the defendant made it, or
2 the defendant made the representation recklessly and
3 without regard for its truth; (4) the defendant intended
4 that the plaintiff rely on the representation; (5) the
5 plaintiff reasonably relied on the representation; (6)
the plaintiff was harmed; and (7) the plaintiff's
reliance on the defendant's representation was a
substantial factor in causing that harm to the plaintiff.

6 Manderville v. PCG&S Group, Inc., 146 Cal. App. 4th 1486, 1498 (2007)
7 (citations, footnotes and quotations omitted); see also 9 Witkin Sum.
8 Cal. Law Torts § 772 (2016 ed.) (collecting cases).

9 Under both California and Oregon law, it is settled that, to state
10 a cause of action for deceit based on a misrepresentation, a plaintiff
11 must plead that he or she actually relied on the misrepresentation. See
12 ISE Entm't Corp. v. Longarzo, 2018 WL 1569803, at *9 (C.D. Cal. Feb. 2,
13 2018)(citing Pulver v. Avco Financial Services, 182 Cal. App. 3d 622,
14 640 (1986) ("the plaintiff is the person to whom the representation must
15 have been made, and it is the plaintiff who must have relied on the
16 misrepresentation to his damage."); see also Strawn, 350 Or. at 352-3.

17 Plaintiff's fraud claim is based on the same set of facts as
18 plaintiff's identity theft claim. Under either California or Oregon
19 law, plaintiff's claim fails: Plaintiff's pleadings state that
20 defendants' alleged representations "induce[d] others (ie - banks and
21 other lenders) to act on their false representations." Complaint, ¶
22 140. Nowhere does plaintiff allege or provide proof that plaintiff
23 relied on false representations made by defendants. Accordingly,
24 plaintiff failed to adequately plead a claim for fraud against
25 defendants. Moreover, plaintiff failed to produce **any** evidence in
26 ///

1 support of his claim that defendants engaged in any of the fraudulent
2 behavior he alleges.

3 Accordingly, defendants' motion for summary judgment on plaintiff's
4 fifth claim for relief will be granted.

5 g. Conspiracy

6 Plaintiff's claim for conspiracy is rooted solely in his identity
7 theft claim. Complaint, ¶ 147. With limited exceptions that are not
8 applicable here, "conspiracy is not an independent tort under Oregon
9 law" and "civil conspiracy is not a separate theory of recovery"
10 McFarlin v. Gormley, 2008 WL 410104, at *14 (D.Or. Feb. 12, 2008)
11 (citing Bliss v. Southern Pac. Co., 212 Or. 634, 642 (1958)). The same
12 is true under California law. See Applied Equip. Corp. v. Litton Saudi
13 Arabia Ltd., 7 Cal. 4th 503, 510 (1994).

14 As explained above, summary judgment will be granted for defendants
15 on plaintiff's identity theft claim based on plaintiff's failure to
16 demonstrate that there is a material issue of fact in support of his
17 claim. Because there is no independent claim for conspiracy, and in any
18 event the claim underlying plaintiff's conspiracy claim does not survive
19 summary judgment, defendants' motion for summary judgment as to
20 plaintiff's conspiracy claim will also be granted.

21 h. Tax Liability Creation

22 Plaintiff's seventh claim, that defendants improperly created
23 income tax liability in plaintiff's name, also fails. Plaintiff alleges
24 that defendants stole his identity, incurred debt in his name and, when
25 that debt was forgiven, he was charged with forgiveness of indebtedness
26 income, resulting in tax liability.

1 Plaintiff's claim fails for the same reason that plaintiff's
2 identity theft claim fails: Plaintiff has failed to produce any credible
3 evidence that defendants stole his identity. He did not provide any
4 evidence of any debts incurred in his name that were forgiven. In
5 response to discovery requests regarding debts incurred in his name,
6 plaintiff asserted he had requested such information from the IRS and it
7 would be forthcoming. However, as outlined above, there is no reason
8 why plaintiff would not have direct access to bank statements, credit
9 card statements and other financial information substantiating his
10 claim, without having to rely on the IRS. Moreover, given that the
11 identity theft and alleged debts date back several years, plaintiff has
12 had ample time to obtain such documents. Plaintiff was unable to
13 produce even a "scintilla of evidence" that defendants stole his
14 identity or that there were debts created in his name that were
15 forgiven. Therefore, summary judgment will be granted on his claim for
16 improper creation tax liability based on that theft.

17 i. Negligent or Intentional Infliction of Emotional Distress

18 Plaintiff's emotional distress claim is based on the "psychic
19 injuries" he alleges he sustained as a result of defendants' alleged
20 conversion of his real and personal property and identity. Complaint,
21 ¶¶ 151-52. Defendants argue that plaintiff failed to produce any
22 evidence of the underlying harm and, therefore, cannot make out a claim
23 for either intentional or negligent infliction of emotional distress.
24 Defendants' Supplemental Memorandum in Support of Defendants' Motion for
25 Summary Judgment (hereinafter "Defendants' First Supplemental Memo"),
26 Doc. 302. Defendants also argue that plaintiff's claim is barred by the

1 applicable statute of limitations. Defendants' Second Supplemental
2 Memorandum in Support of Defendants' Motion for Partial Summary Judgment
3 (hereinafter "Defendants Second Supplemental Memo"), Doc. 312.

4 Because this is a state law claim, the court must first determine
5 which state's law to apply.

6 Under Oregon law, a plaintiff may recover emotional distress
7 damages only when the harm is tied to a physical injury. See Tomlinson
8 v. Metro. Pediatrics, LLC, 275 Or. App. 658, 679 (2015). However, there
9 are exceptions, such as when a defendant acts intentionally or "causes
10 foreseeable, serious emotional distress and also infringes some other
11 legally protected interest." Philibert v. Kluser, 360 Or. 698, 702
12 (2016). "The right to recovery for such injuries does not arise from
13 infringement of every kind of legally protected interest, but from only
14 those that are of sufficient importance as a matter of public policy to
15 merit protection from emotional impact." Id. at 705 (internal citations
16 omitted).

17 To prevail on an [intentional infliction of emotional
18 distress] claim, a plaintiff must prove that (1) the
19 defendant intended to inflict severe emotional distress
20 on the plaintiff, (2) the defendant's actions caused the
21 plaintiff severe emotional distress, and (3) the
22 defendant's actions transgressed the bounds of socially
23 tolerable conduct. McGanty v. Staudenraus, 321 Or. 532,
543, 901 P.2d 841 (1995).

23 Schiele v. Montes, 231 Or. App. 43, 48 (2009).

24 Under California law,

25 the negligent causing of emotional distress is not an
26 independent tort but the tort of negligence. The
traditional elements of duty, breach of duty, causation,

1 and damages apply. The basic inquiry is whether the
2 plaintiff's interests are entitled to legal protection
3 against the defendant's conduct. Duty is an expression
4 of the sum total of those considerations of policy which
5 lead the law to say that the particular plaintiff is
6 entitled to protection. In considering the existence of
7 duty in a given case several factors require
8 consideration including the foreseeability of harm to the
9 plaintiff, the degree of certainty that plaintiff
10 suffered injury, the closeness of the connection between
11 the defendant's conduct and the injury suffered, the
12 moral blame attached to the defendant's conduct, the
13 policy of preventing future harm, the extent of the
14 burden to the defendant and consequences to the community
15 of imposing a duty to exercise care with resulting
16 liability for breach, and the availability, cost, and
17 prevalence of insurance for the risk involved.

18 Eriksson v. Nunnink, 233 Cal. App. 4th 708, 729 (2015) (original
19 emphasis and citations omitted).

20 To state a cause of action for intentional infliction of
21 emotional distress a plaintiff must show: (1) outrageous
22 conduct by the defendant; (2) the defendant's intention
23 of causing or reckless disregard of the probability of
24 causing emotional distress; (3) the plaintiff's suffering
25 severe or extreme emotional distress; and (4) actual and
26 proximate causation of the emotional distress by the
defendant's outrageous conduct.

Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA,
Inc., 129 Cal. App. 4th 1228, 1259 (2005) (quoting Trerice v. Blue Cross
of Cal., 209 Cal. App. 3d 878, 883 (1989)).

Both Oregon and California apply a two-year statute of limitations
to emotional distress claims. ORS 12.110; Cal. Civ. Proc. § 335.1;
Miller v. Bank of Am., Nat. Ass'n, 858 F.Supp.2d 1118, 1127 (S.D. Cal.
2012). Therefore, I need not choose between Oregon and California law
to determine the applicable statute of limitations.

1 Plaintiff's emotional distress claim is based on the alleged
2 conversion of plaintiff's property and theft of his identity. For the
3 reasons set out above, as of June 5, 2009, plaintiff knew or should have
4 known about the existence of his claims for emotional distress related
5 to the alleged conversion of his money, real property, and personal
6 property. Accordingly, the claim falls outside the two-year statute of
7 limitations and is barred.

8 Plaintiff argues that the statute of limitations with regard to
9 conversion of property is tolled by the presence of ongoing litigation
10 or litigation that never resulted in a final judgment against him. See
11 Plaintiff's Response to (DE 303) ORDER as to Limitations of Actions
12 Regarding 8th Cause of Action and (DE 312) Defendants' Response Thereto
13 (hereinafter "Plaintiff's Second Supplemental Memo"), Doc. 318.

14 In support of his proposition that existence of prior litigation
15 addressing some of the same factual allegations made in the present
16 litigation tolls applicable statutes of limitations here, plaintiff
17 cites Burlington Indust. v. Miliken & Co., 690 F.2d 380 (4th Cir. 1982).
18 Plaintiff argues that defendants initiated litigation against him in
19 2006 and that, as a result, the statute of limitations on his claim was
20 tolled.

21 The Burlington court ruled that "the institution of plaintiff's
22 suit tolls or suspends the running of the statute of limitations
23 governing a compulsory counterclaim." 690 F.2d at 389 (quoting 6 C.
24 Wright & A. Miller, Federal Practice and Procedure § 1419, at 109);
25 accord N. Cnty. Commc'ns Corp. v. Sprint Commc'ns Co., L.P., 691 F.
26 App'x 466 (9th Cir. 2017).

1 The 2006 litigation to which plaintiff refers appears to be Case
2 No. 115212 in the Superior Court of the State of California in and for
3 the County of San Mateo, which is a "Petition for Order Confirming
4 Transfer of Trust Assets" pursuant to Probate Code § 172001.1
5 (hereinafter "2006 Case"), attached as Exhibit D to Plaintiff's Motion
6 for Summary Judgment. The 2006 Case was filed by plaintiff's father and
7 brother Victor. In addition to the complaint in that case, plaintiff
8 supplied an undated "Case Information" sheet that shows that the case is
9 "active" and lists defendants Victor and Anthony Szanto as
10 "petitioners." However, plaintiff provides no evidence that his claims
11 in this action were compulsory counterclaims, or that he either asserted
12 them or is not yet required to assert them. As explained above, where
13 the moving party has properly supported its motion for summary judgment,
14 the party opposing judgment must provide specific facts showing that
15 there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc.,
16 477 U.S. at 250 (1986). Plaintiff's evidence and argument fall
17 significantly short of establishing that plaintiff's claims have
18 actually been tolled for the last eleven years and that an issue of fact
19 remains to be tried. Because plaintiff's emotional distress claim
20 relating to defendants' alleged conversion of his property is untimely,
21 the court need not reach the question of whether any evidence exists to
22 support the underlying claim.

23 The second portion of plaintiff's emotional distress claim stems
24 from the alleged theft of his identity. As discussed above, plaintiff
25 produced no evidence to support his claim of identity theft. As a
26 result, plaintiff's emotional distress claim as it relates to the

1 alleged identity theft fails to meet the requirement that plaintiff
2 demonstrate evidence that defendants engaged in outrageous conduct that
3 caused plaintiff's emotional distress.

4 For these reasons, plaintiff has failed to demonstrate that any
5 triable issue of fact remains on his emotional distress claim.
6 Accordingly, summary judgment will be entered for defendants.

7 j. Plaintiff's Request to Void Transactions

8 Plaintiff argues in his summary judgment motion that transfers of
9 assets of his parents' trust should be declared void, relying on state
10 voidable transactions laws. Defendants respond correctly that plaintiff
11 has not pled a claim for avoidance of transfers. Plaintiff asks in his
12 reply that he be allowed to amend his complaint to add a claim to avoid
13 the transfers.

14 Plaintiff's request to amend the complaint to assert an avoidance
15 action comes too late. Although leave to amend should be freely given
16 under Fed. R. Civ. P. 15, that liberality is limited by the scheduling
17 order entered in this case pursuant to Fed. R. Civ. P. 16. That
18 scheduling order, entered in November 2016, Doc. 21, requires that
19 amendments to pleadings occur within 120 days of the filing of the
20 complaint. Plaintiff does not assert any new information or facts that
21 he has learned that would justify extending that deadline to allege a
22 new claim based on the same facts that he has known since at least 2009.
23 Therefore, his request to amend his complaint to add a voidable transfer
24 claim is denied.

25 ///

26 ///

1 2. Defendants' Counter-Claim for Wrongful Initiation of Civil
2 Proceedings

3 The parties filed cross-motions for summary judgment on defendants'
4 second counter-claim for wrongful initiation of civil proceedings.
5 Plaintiff moves for summary judgment against defendants' claim on the
6 basis that defendants lack adequate evidence to support their claim.
7 See generally, Plaintiff's Motion. Defendants move for partial summary
8 judgment, arguing that they have submitted substantial evidence to meet
9 their burden on all elements of their claim except the amount of
10 damages. Defendants' Memo, p. 21. Plaintiff responds that defendants'
11 pleadings fail to state a claim, claim preclusion bars defendants'
12 claim, this court lacks jurisdiction to hear defendants' claim, and
13 defendants' motion for summary judgment is merely a conclusory statement
14 and fails to meet the requirements for a grant of summary judgment.
15 Plaintiff's Response to Defendants' Motion for Summary Judgment
16 (hereinafter "Plaintiff's Response"), pp. 20-21 (Doc. 266).

17 Under Oregon law, a claim for wrongful use of civil proceeding
18 requires the claimant to show:

- 19 (1) The commencement and prosecution by the defendant of
20 a judicial proceeding against the plaintiff;
- 21 (2) The termination of the proceeding in the plaintiff's
22 favor;
- 23 (3) The absence of probable cause to prosecute the
24 action;
- 25 (4) The existence of malice, or as is sometimes stated,
26 the existence of a primary purpose other than that of
securing an adjudication of the claim; and

1 (5) Damages.

2 Liberty Natural Prod., Inc. v. Hoffman, 2012 WL 1203979, at *6 (D. Or.
3 Apr. 11, 2012) (citing Roop v. Parker Nw. Paving, Co., 194 Or. App. 219,
4 237-38 (2004), rev. den., 338 Or. 374 (2005)).

5 Under California law, the analogous tort - malicious prosecution -
6 "is committed whenever a prior action is brought with malice and without
7 probable cause by the plaintiff, and is subsequently terminated in favor
8 of the defendant." Brennan v. Tremco Inc., 25 Cal. 4th 310, 320 (2001).

9 Plaintiff argues that defendants failed to produce documents
10 plaintiff properly requested substantiating their claim and therefore
11 should be sanctioned in the form of a bar to their claim. During
12 discovery, plaintiff requested production of "all documents which
13 substantiate and confirm" Anthony Szanto's claim during his deposition
14 that plaintiff had sued him between 60 and 100 times, to which
15 defendants responded that no documents exist. Plaintiff's Motion, Ex.
16 C-2. All parties agree that plaintiff has not sued Anthony Szanto
17 between 60 and 100 times.

18 Despite failing to produce any documents of incidents where
19 plaintiff had sued defendants in the past, in response to plaintiff's
20 motion for summary judgment, defendants provided a list of prior
21 lawsuits by plaintiff against defendants, along with declarations of
22 Victor Szanto, Anthony Szanto, and Evye Szanto listing lawsuits
23 plaintiff had filed against them. Defendants' Response to Plaintiff's
24 Concise Statement of Material Facts, Sch. 1; Decl. of Victor Szanto;
25 Decl. of Anthony Szanto, Decl. of Evye Szanto (Doc. 231).

26 ///

1 The court finds it troubling that, despite plaintiff's request for
2 documents to substantiate their claim of wrongful initiation of civil
3 proceedings, defendants failed to provide any documents and instead
4 stated that none exist. Now, in response to plaintiff's motion for
5 summary judgment, they list lawsuits on which they rely for their claim.
6 Nonetheless, plaintiff does not appear to have been prejudiced by
7 defendants' failure. Plaintiff presumably has equal knowledge of and
8 access to documents related to the number of times he has sued
9 defendants. Moreover, because summary judgment will be denied to both
10 sides, defendants will be required to present evidence in support of
11 their claim and plaintiff will be afforded the opportunity to rebut
12 their evidence.

13 Plaintiff's motion for summary judgment is more accurately
14 characterized as a motion for sanctions based on defendants' failure to
15 produce documents regarding litigation between the parties. However, if
16 plaintiff wished to seek a discovery sanction based on this discovery
17 issue, he should have filed a motion for discovery sanctions. He
18 elected not to do that. A motion for summary judgment is not the
19 appropriate vehicle for requesting such relief. Moreover, based on the
20 evidence before the court, there remains a genuine issue of material
21 fact as to the number of times plaintiff has sued defendants and the
22 outcome of those suits. Accordingly, plaintiff's motion will be denied.

23 As to defendants' motion for summary judgment on their counter-
24 claim for wrongful use of civil proceedings, plaintiff argues that
25 defendants failed to put him on adequate notice of the basis for their
26 motion for summary judgment. I agree.

1 Defendants failed to provide sufficient information about their
2 claim to allow the court to determine whether Oregon or California law
3 applies. However, the law in both states requires a showing that
4 plaintiff lacked probable cause to bring the complained of litigation
5 and that the litigation was terminated in defendants' favor. Defendants
6 have failed to carry this burden on summary judgment.

7 Defendants' Memo merely lists the elements of their claim and
8 states that "the evidence submitted herewith demonstrates that the first
9 four elements have been satisfied." Defendants' Memo, p. 21.

10
11 A party can only be held to have failed to satisfy its
12 duty under Celotex to "designate 'specific facts showing
13 that there is a genuine issue for trial,'" Celotex v.
14 Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91
15 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.Pro. 56(e)),
16 however, if the moving party placed the nonmoving party
17 on proper notice. "Of course, a party seeking summary
18 judgment always bears the initial responsibility of
19 informing the district court of the basis for its
20 motion." Id. at 323, 106 S.Ct. at 2552 (emphasis added);
21 see also USA Petroleum [Co. v. Atlantic Richfield Co.],
22 13 F.3d [1276], 1279, 1283 & n. 8 (citing cases)[.]

23 Katz v. Children's Hosp. of Orange County, 28 F.3d 1520, 1534 (9th Cir.
24 1994) (holding that moving party was required to state the basis for its
25 claim that nonmoving party could not demonstrate triable issue of fact
26 in order to succeed on summary judgment). Plaintiff correctly argues
27 that defendants' conclusory statement is insufficient to support
28 defendants' motion for summary judgment, because it fails to put
29 plaintiff on notice of what facts support defendants' claim.

30 Defendants' Concise Statement of Material Fact in Support of
31 Defendants' Motion for Summary Judgment (Doc. 218, hereinafter

1 "Defendants' CSOF") references several instances of litigation between
2 plaintiff and at least some of the defendants. Id. at ¶¶ 4-5, 12-13.
3 However, defendants provided insufficient information from which the
4 court can discern which litigation forms the basis of their claim and
5 the outcome of that litigation.

6 Defendants do not provide sufficient evidence from which the court
7 can discern the ultimate conclusion of the 2005 litigation involving
8 Phillip Szanto. See Defendants' CSOF, ¶ 4. Defendants also provide
9 evidence of other litigation involving plaintiff that eventually formed
10 the basis of a vexatious litigant order, Henderson Decl., Ex. 9, p. 6,
11 but there is no indication on the face of these documents of the outcome
12 of the prior litigation. Next, defendants provide evidence of
13 litigation in Jackson County Oregon, which was ultimately dismissed for
14 failure to properly serve defendants. Defendants' CSOF and Henderson
15 Decl., Ex. 4. However, defendants do not explain why a procedural
16 default for failure to prosecute in this instance rises to the level of
17 a termination in defendants' favor. This leaves only the adversary
18 proceeding in plaintiff's 2013 chapter 11 bankruptcy in the United
19 States Bankruptcy Court for the District of Nevada ("Nevada
20 Litigation"), which appears undisputed. Plaintiff's Response to
21 Defendants' Concise Statement of Material Facts (Doc. 267), ¶13.
22 However, because neither defendants' complaint nor defendants' motion
23 for summary judgment informs the court which litigation forms the basis
24 of their claim, plaintiff has not been provided sufficient notice of the
25 basis of defendants' motion for summary judgment. Accordingly,
26 defendants' motion for partial summary judgment on their second counter-

1 claim will be denied. The court need not reach plaintiff's other
2 arguments.

3 3. Additional arguments

4 The court has considered the other arguments raised by the parties.
5 For the reasons stated above, the court need not reach them or they are
6 moot, immaterial, or otherwise without merit and will not be addressed
7 separately.

8 CONCLUSION

9 Defendants' motion for summary judgment motion will be granted as
10 to all of plaintiff's claims. Plaintiff's and defendants' cross-motions
11 for summary judgment as to defendants' second counter-claim will be
12 denied.

13 ###

14 Cc: Mr. Szanto
15 Mr. Henderson
16 UST
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